

CLARK FORK RIVER BASIN

Water Plan News

Volume I Number 1
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Our Most Important Liquid Asset

Please pardon the pun, but this newsletter is, afterall, about water and the Clark Fork River Basin.

Water is so obviously critical to agriculture and fish. But the events and controversies in recent years—drought, catastrophic fires, escalating electricity prices, sewage system expansions, Flathead Lake management, the Clark Fork River Superfund cleanups and pending removal of Milltown Dam to name just a few—remind us that water is a resource none of us can take for granted.

The population in our Basin has grown rapidly and the economy is shifting from natural resource-based industries towards people-related services. Basin water use, in turn, is changing and water management is becoming more complicated.

The waters of the Clark Fork River, Montana's largest river when it leaves the state, are increasingly valuable to downstream states for salmon recovery, hydroelectric generation, recreation, transportation, and other uses.

Who Are We and What Are We About?

In response to our changing circumstances and to protect Montana's interests relative to downstream states, the 2001 Montana Legislature passed and the Governor signed into law House Bill 397: "An Act Establishing the Clark Fork River Basin Task Force...." This Act authorized the creation of the Clark Fork Basin Task Force [made up of representatives of basin water users, not of federal and state agencies] and charged it by September 15, 2004 with drafting a water management plan for the entire Clark Fork River Basin. This new river plan must identify options to protect the security of water rights and provide for the orderly development and conservation of water in the future.

Writing a water management plan for a basin as large as the Clark Fork is a unique undertaking. Though we've been meeting monthly since August of 2002—learning about basin water resources, uses and issues—we need to hear from you before completing our report. We will conduct both formal and informal consultations with basin water users and interests.

The purpose of this newsletter is to provide a basic background about how water use is regulated in Montana and an initial "heads up" about some of the ideas the Task Force is considering as a part of this consultation process. Please contact us with your questions and comments!

Water Rights 101

To divert and use water in Montana for other than small domestic groundwater and stock watering uses, one must possess a water right. A water right is conferred by the state and authorizes water use, but not water ownership. Water rights are subject to a legal framework referred to as the prior appropriation doctrine which includes two general rules expressed by the following easy-to-remember rhymes: "First in time, first in right," and "Use it or lose it."

"First in time, first in right" relates to the priority date of a water right. The priority date refers to the date on which the water was first put to beneficial use. The earlier the priority date, the better the water right. A senior water right holder with an earlier priority date is entitled to use the full amount of his or her water right before a junior water right holder can use any water. In times of shortage, the senior water right holder can take all of the available water. There is no requirement that water be shared among the various users.

"Use it or lose it" refers to the requirement to use water beneficially. For example, if someone has the right to divert water for irrigation but is haying and does not currently need the water for beneficial use, he or she cannot continue to divert the water but must leave it in the stream for use by junior water rights holders. When water is no longer put to a beneficial use, the right to use it can be lost or abandoned. Beneficial use is the "basis, measure, and limit" of a water right. In other words, if someone claims a water right for 200 miner's inches but has historically used only 100 miner's inches, that person's water right is limited to the 100 miner's inches put to beneficial use.

Prior to 1973, one could acquire a water right in one of two ways: by putting water to a beneficial use or by posting a notice of intent to use water and filing the notice with the county clerk. No written record existed for rights acquired the first way, the so-called use rights. Without the written records, Montana struggled to develop a mechanism to administer the development of new water rights. In 1973, the legislature passed the Montana Water Use Act. In addition to establishing a centralized record system for water rights, this Act: "Required that all water rights existing prior to July 1, 1973 must be finalized through a statewide water rights adjudication in state courts; established a permit system for obtaining water rights for new or additional water rights; and established an authorization system for changing water rights.

Since the passage of the 1973 Water Use Act, a person cannot receive a new right to use water without first applying for and receiving a water use permit from the Montana Department of Natural Resources and Conservation [DNRC]. Before the DNRC can issue a water use permit, the applicant must prove, among other things, that unappropriated water is available for the new use and the new use will not adversely affect existing water rights.

Water Rights Adjudication

All water rights with a priority date before July 1, 1973, except for some domestic groundwater and stockwater rights, are currently being adjudicated by the Montana Water Court. The adjudication involves a number of different stages including the filing of water right claims, verification of those claims by the DNRC, the issuance of a preliminary decree followed by the filing of objections and the holding of hearings, and the issuance of a final decree including the legally recognized water rights.

A key part of the adjudication process is the determination of water rights reserved by the federal government and by Indian tribes to meet the purposes of lands they hold. The state is attempting to determine these federal rights through a negotiation between the Montana Reserved Water Rights Compact Commission and federal agencies [e.g. US Forest Service] and the tribes (e.g. Confederation of Salish and Kootenai Tribes).

The adjudication began with the filing of claims for pre-July 1, 1973 water rights by April 30, 1982. Several areas in the Clark Fork Basin, including the upper Clark Fork basin and the Middle and South and Forks of the Flathead River, have received temporary preliminary decrees. Several others, including Blackfoot, most of the Bitterroot, Flathead Lake, and the lower Flathead River, have not. No area has a final decree. Final decrees must await determinations of the federal and the Confederation of Salish and Kootenai Tribes reserved water rights.

Options to Protect the Security of Water Rights

One of the Task Force's mandates is to identify options to protect the security of water rights. Our initial thinking is that security in a water rights context means that the water allocation rules are not changing and that their application is both predictable and certain. Security also means that enforcement of water rights is timely and affordable. Allocations are not knowable until the water rights on which they are based are finalized. **This means that until the reserved federal and tribal water rights are determined and the adjudication is completed, no water rights will be secure.** Given the staffing and financial resources now available to the DNRC and the Water Court, no one has any idea when the adjudication will produce final water rights decrees. Therefore, the Task Force is considering recommending specific dates as goals for completing key steps in the adjudication process in the Clark Fork basin, and asking the legislature to provide additional funding and staffing resources for the adjudication and compact negotiation processes. In addition, the Task Force believes that steps must be taken to ensure the accuracy of the adjudication. Presently the Water Court examines the accuracy of water rights claims only if individual rights holders file objections to them in the Court process. If no one objects to inaccurate claims, they could be included in final decrees. Although it has ruled that it has the authority to examine claims itself, the Court is not doing so. This problem could be alleviated in one of two ways. First, the Court could examine claims and resolve those it finds to be inaccurate. Second, an institutional objector such as the DNRC or the Montana Attorney General could be empowered and funded to examine claims and to object to those found to be inaccurate. Adequate funding would be necessary because of the number and complexity of the claims which must be examined.

Options to Provide for the Orderly Development and Conservation of Water in the Future

The Task Force has tentatively defined orderly development of water to mean a process to quantify physically and legally available water and provide for its use by the various competing existing and futures uses, and conservation of water to mean the long-term, sustainable use of water resources. We are identifying regulatory, management, and research and education options for providing for the orderly development and conservation of water. These options may differ among the sub-basins that make up the Clark Fork Basin [see map on center page]. Future issues of this newsletter will explore detailed strategies for doing both.

Your Ideas and Concerns

Task Force members want to hear from you about your ideas and concerns about a water management plan for the Clark Fork Basin. Please contact members directly, or send comments to: Clark Fork Task Force c/o The Montana Consensus Council, P.O. Box 200146, Helena, MT 59620-0146 or via email to Matthew McKinney at

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